No. 5278

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HOTCHKISS REDWOOD COMPANY, a Corporation,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

GEO. J. HATFIELD,
United States Attorney.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

LYNDON H. BAYLIES,
Attorney, Bureau of Internal Revenue.

Neal, Stratford & Kerr, S. F.

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At the outset it may be pointed out that counsel's argument that the capital stock tax if applied to plaintiff would be a direct tax on property and, therefore, unconstitutional because not apportioned according to population, begs the question at issue in the case at bar, namely, whether or not plaintiff was doing business, since it is based upon the assumption that plaintiff was not doing business. The authorities are clear that the tax is an excise imposed "upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organization." *Flint v. Stone Tracy Company,* 220 U. S. 107, 145; *Hecht v. Malley,*

265 U. S. 144; *Central Union Trust Company v. Edwards,* 287 Fed. 324, certiorari denied 43 Sup. Ct. 541; *Washington Water Power Company v. United States,* 56 Ct. Clms. 76.

Whether or not plaintiff was doing business depends upon whether speculating in timber lands is "business" within the meaning of the capital stock tax law. In February, 1928, two decisions, throwing light on this question were handed down by the District Court for the Western District of Pennsylvania in the cases of *Harmar Coal Company v. Heiner,* and *Indianola Coal Company v. Heiner,* both of which involved companies engaged in holding coal lands for sale or development, and doing the acts incidental to such business. Copies of these opinions which have not, as yet, been reported are appended to this brief. The Court's conclusion, that these companies were doing business, was based upon the decisions of the Supreme Court in *Flint v. Stone Tracy Company,* 220 U. S. 107; *Von Baumbach v. Sargent Land Company,* 242 U. S. 503; *Edwards v. Chile Copper Company,* 270 U. S. 452; and *Phillips v. International Salt Company,* 274 U. S. 718. In the latter case, the Supreme Court on May 2, 1927, in a per curiam opinion reversed the decision of the Circuit Court of Appeals for the Third Circuit, 9 Fed. (2d) 389, on authority of its decision in the *Chile Copper Company case, supra.* The case involved the taxable years beginning July 1, 1918, and ending June 30, 1922. The facts, as stated in the Circuit Court's opinion, were as follows:

> "The Salt Company was a holding one, its assets consisting of the stocks of subsidiary companies which were 'carrying on and doing business' and

paid excise tax for so doing. The only acts the company did and which are alleged to warrant the imposition of the tax were as follows: Prior to 1908 it had bought and since owned all the capital stock of the Retsof Mining Company. That company then had outstanding a mortgage issue. Between March 1st, 1918, and February of 1919 the Salt Company bought ten of such mortgage bonds, and from March 1, 1919, to December 31, 1919, by purchase or exchange it became the owner of fifteen more. During 1920 it made several like purchases and also exchanged certain of its own bonds for 179 bonds of the Retsof Company. On March 27, 1918, it endorsed a note of $150,000.00 given by the International Salt Company of New York to the Irving Trust Company, and on September 25, 1918, a like note of $70,000.00. The maker of the note was one of the subsidiary companies above described, whose entire stock was owned by the plaintiff.

"During 1920 the plaintiff received as a dividend from the Retsof Company, as a stock dividend, the entire capital stock of the Avery Rock Salt Company, and in June, 1921, it received from the International Salt Company of New York as a dividend a majority of the capital stock of the Detroit Rock Salt Company and the entire stock of the Eastern Salt Company. On March 26, 1919, the plaintiff endorsed the note of a subsidiary company for $86,500.00, with which the latter bought Liberty bonds. From time to time the plaintiff has, to meet its current expenses, taxes, for the purchase of its own bonds for its sinking fund or to buy Retsof bonds, had money advanced to it by its subsidiary, the Salt Company of New York. All such advances were repaid by crediting them on the dividends later declared by the latter company on its own stock held by the plaintiff."

On the basis of these facts, the Circuit Court held that the company was not doing business, the reasoning of the court being as follows:

"Looking on the present case in the light of previous decisions in this and other circuits, McCoach v. Minehill Co., 228 U. S. 295; Lewellyn v. Pittsburgh E. L. & R. Railroad Co., 222 Fed. Rep. 177; and Public Service Rwy. Co. et al. v. Herold, 229 Fed. Rep. 902, we feel none of these acts constitute doing business in the purview of the statute. The owning of stock, the receipts and distribution of dividends, the endorsing of the notes of a company whose stock it held, the purchase of bonds for retirement or sinking-fund purposes, amount to no more than acts incidental to the ownership of property. They are not the positive, aggressive acts incidental to the active carrying on or doing business for gain, but rather the receipt of the gains of business capitalized in ownership. Sensing the words in their common everyday meaning we are of opinion that Congress, however it might treat the gains of this company as income, did not mean to place an excise tax on the capital stock of such a company as one 'carrying on or doing business.' Its purpose was to put an excise tax on the company really carrying on or doing business—in this case the subsidiary company—and not on the shareholder of the subsidiary, who was in receipt of the profits arising from such acts carrying on or doing of business. Thus regarding the plaintiff's acts, the judgment below is reversed and the cause remanded for further procedure."

It will be noted, that in comparison with the activities of the Chile Copper Company, the activities of the International Salt Company were of very limited scope consisting chiefly of buying its own bonds for retirement under a sinking fund agreement and bonds of the Retsof Mining Company, a 100 per cent owned subsidiary. These activities were, in effect, nothing more than the payment by the Salt Company of its own debts. In addition, the Salt Company also owned and voted the stock of subsidiary companies, endorsed notes

of a subsidiary on two or three occasions to enable the subsidiary to borrow funds, and received advances from a subsidiary, from time to time, for use in paying current expenses and buying its own bonds, and Retsof Company's bonds, such advances being later credited against dividends due from the subsidiary. The fact that these activities were held by the Supreme Court on authority of the Chile Copper Company case to be doing business indicates that the principles laid down by the Court in the Chile Copper Company case are in the nature of general tests to be applied in determining whether a company is doing business.

The United States District Court for the District of Minnesota in August, 1927, held in the case of *Conhaim Holding Company v. Willcuts, Collector,* 21 Fed. (2d) 91, that a corporation which had been organized to hold, conserve, and liquidate the assets belonging to an estate was doing business within the meaning of the Capital Stock Tax Law although during the taxable period it was "not actively engaged in business." The opinion of the Court reads in part as follows:

> "In December, 1920, the plaintiff, Conhaim Holding Company, was incorporated under the laws of Minnesota. Its main object was to hold and conserve the assets belonging to the estate of Louis Conhaim, deceased, to liquidate them when that could be done advantageously, and to distribute their avails among the stockholders of the corporation. The estate consisted of stocks, leaseholds, timber land and life insurance renewal commissions. The corporation has maintained an office, but has no employees. It has never dealt in securities. It has never sold the timber land because no opportunity has arisen to sell it. No income is re-

ceived from it. The secretary of the corporation receives a salary of $100 a year for his services and is an auditor and accountant. The income of the corporation consists of dividends upon the stocks, renewal commissions upon life insurance written by Louis Conhaim in his lifetime, and rentals from the leaseholds. Numerous loans have been made by the corporation to its stockholders, who—with the exception of a son-in-law and the secretary, who hold qualifying shares—are the heirs of Louis Conhaim. One loan was made to the American Security Company at the request of the son-in-law. The loans were apparently made for the accommodation and benefit of the stockholders, but interest was paid and collected. In some cases, the company has loaned its credit to the stockholders, and in other cases, when in funds, has permitted them to have the use of funds, paying the current rate of interest therefore. No distribution of assets or income has been made, and the carrying charges of the property require most of the income."

* * * * * * * *

"In Edwards v. Chile Copper Co., 270 U. S. 452, 455, Mr. Justice Holmes said of the corporation there involved:

'It was organized for profit and was doing what it principally was organized to do in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit.'

"It is true that the Conhaim Holding Company was not engaged actively in business, but its purpose was to hold the assets of the estate until they could be disposed of advantageously and profitably, and then to distribute the avails. In the meantime it was to handle the stocks, leaseholds, lands and other assets in such a way as would be to the best

advantage of the corporation and those interested in it and so as to produce the largest amount for ultimate distribution, and that is what has been done. No distribution has been made because the time has not been reached when that can be done profitably.

"To my mind, the question is a very close one, and my first impression was that the company was not subject to the tax and should not have paid it; but I cannot escape the conclusion that the company is something more than a mere intermediary or agency for the stockholders. They chose the advantages of corporate organization as the best solution of the problem with which they were confronted, and the best and most profitable means of disposing of the assets of Louis Conhaim and their ultimate distribution. Concededly the corporation was organized to get a better price for these assets than was obtainable when it was organized, and the stockholders are receiving and will receive whatever gains may accrue by reason of its corporate activities in connection with the holding of the property for a better price and the investment of the funds in the meantime. While it has these assets, it does and must necessarily do what any other corporation would do which owned such property and was holding it for sale at a profit.

* * * * * * * *

"Finding the facts to be as hereinbefore stated, I reach the conclusion that the defendant is entitled to judgment * * * ."

The following cases upon which plaintiff relies are distinguishable from the case at bar:

McCoach v. Minehill Railroad Company, 228 U. S. 295;

United States v. Three Forks Coal Company, 13 Fed. (2d) 631;

Eaton v. Phoenix Securities Company, 22 Fed. (2d) 497;

Cannon v. Elk Creek Lumber Company, 8 Fed. (2d) 996;

Fink Coal & Coke Company v. Heiner, Volume III, Commerce Clearing House 1928 Standard Federal Tax Service, page 8164;

Rose v. Nunnally Investment Co., 22 Fed. (2d) 102, (Certiorari denied March 6, 1928).

The *Minehill Company case, supra,* involved a corporation which was organized to engage in the railroad business, but prior to the taxable years involved it had leased its railroad properties to the Reading Company for a term of 999 years, and during such taxable years it merely maintained its corporate existence, received rentals from the leased premises, interest from bank balances, and dividends from personal assets known as a contingent fund in the form of investments, and distributed such amounts to its stockholders. The Minehill Company made no changes in its investments during the taxable years in question. It did not invest or reinvest its funds, but merely received the income from its investments. In speaking of these investments, this Court said (p. 306):

> "There remains to be considered the fact that the Minehill Company has a considerable amount of personal assets known as its 'contingent fund,' in the form of investments (the amount and particulars are not specified), from which it derives an annual income of about $24,000; that it keeps a deposit in bank, receives and collects interest upon such deposit, and distributes the income thus received, as well as the rentals received from the Reading Company (after payment of expenses and taxes), to its stockholders in the form of dividends.
>
> "In our opinion the mere receipt of income from the property leased (the property being used in

> business by the lessee and not by the lessor) and the receipt of interest and dividends from invested funds, bank balances, and the like, and the distribution thereof among the stockholders of the Minehill Company, amount to no more than receiving the ordinary fruits that arise from the ownership of property."

Thus, unlike plaintiff the Minehill Company had gone out of the business for which it was organized, and merely received and distributed income from the leased property, management of which was in the lessee, dividends on investments and interest on bank deposits and the like. Manifestly, this case is not authority for the proposition that a corporation which pursuant to its charter purpose was engaged in speculating in timber lands.

The cases of *Three Forks Coal Company* and *Phoenix Securities Company, supra,* are distinguishable on the facts. These companies were merely depositaries for stock of certain other corporations.

In the *Elk Creek Lumber Company case, supra,* the timber lands in question were not purchased for purposes of speculation, as in the instant case, but were bid in by bondholders to protect their bonds on foreclosure sale. It is submitted that this situation is different from that of a corporation which is organized for the purpose of acquiring lands for speculative purposes. Moreover, this case was decided prior to the *Chile Copper Company* and *International Salt Company* decisions.

The *Fink Coal and Coke Company case* involved a corporation which had been organized for the purpose

of acquiring and operating coal properties. Prior to the taxable period the project of operating the mines was abandoned, due to the failure of a railroad to extend its line to the property. During the taxable years, the directors were authorized by the stockholders to sell the properties, but no sales were ever made. Here also, the company had abandoned the purpose for which it was organized.

The *Nunnally Company case* involved a corporation which, prior to the taxable years, had sold its candy business, and pursuant to its original charter powers, had invested the proceeds of the sale, approximately $2,500,000.00, in sound securities and notes of its stockholders yielding an average steady rate of from 6 per cent to 7 per cent. During each taxable year, the corporation reinvested in the same sort of securities approximately $200,000.00 resulting from the maturing of bonds and payments of loans and approximately $100,000.00 derived from the profits of the company. The latter amount was invested because it was desired to build up a reserve to meet disputed income tax claims pending against the company, and also because of the policy of the company of paying a stated semi-annual dividend of $50,000.00. The corporation also loaned about $6,000.00 to employees of a corporation in which it owned stock. While these activities were held by the District Court and Circuit Court of Appeals not to be doing business, it is not conceded that the decisions were correct. See *Conhaim Holding Company v. Willcuts,* 21 Fed. (2d) 91. However, the investment by the Nunnally Company of surplus in staple stocks and other

securities in order to provide funds for paying disputed tax claims, and the reinvestment of amounts derived from maturing of bonds and payment of outstanding loans savors less of business than does speculating in real estate. The refusal of the Supreme Court to grant the Government's application for certiorari in the Nunnally Company case is in no sense equivalent to an affirmance of the decision of the Circuit Court of Appeals in that case. *Talcott, Executrix, v. United States,* decided by this Court on January 20, 1928; *Hamilton Shoe Company v. Wolfe Brothers,* 240 U. S. 251, 258.

In *Monroe Timber Company v. Poe,* 21 Fed. (2d) 766 (Dist. Court of Wash.), plaintiff sued to recover capital stock taxes paid by it for the three fiscal years, July 1, 1922, to June 30, 1925, on the ground that it was not doing business and that its activities were exclusively restricted to the holding of its properties, which consisted entirely of timber land in the State of Oregon, and doing only such acts as were necessary to the maintenance of its corporate existence and the private management of its purely internal affairs.

The pertinent part of the Court's opinion reads:

> "Plaintiff purchased, in 1906, 1907, and 1908, approximately 8,000 acres of timber land, which it has been holding since about 1912 for purposes of sale. In July, 1922, plaintiff purchased 160 acres of land. In December, 1923, it sold 1,080 acres of land. The purchase in 1922 and the sale in 1923 are sufficient, so far as the second and third causes of action are concerned, to take the case out of the proviso exempting a corporation 'not engaged in business.'

"A business such as that of plaintiff's, in its essence, consists of buying and selling, and whether it was engaged in business during the periods in question depends rather on the character of its transactions than on their amount and volume. Von Baumbach v. Sargent Land Co., 242 U. S. 503, 516 and 517, 37 S. Ct. 201, 61 L. Ed. 460. The fact that the purchase of 160 acres was for a strategic purpose, to enable plaintiff to compel another company to haul plaintiff's timber from its holdings, if desired, does not affect the question. While, in one sense, it may have been a defensive measure, yet the court must conclude that such purchase increased the value of its other holdings, and therefore was, as planned, a shrewd business step. It was an additional investment, tending to increase the value of the other lands.

"During the period between June 30, 1921, and July 1, 1922, the only things that can be considered at all in the nature of business transactions by plaintiff were the receipt of payments on a sale theretofore made, and the loaning to its principal stockholder of amounts realized from such sale, together with receipts on account of such loan or loans. Such acts, while in one sense the engaging in business, are primarily incidental to business theretofore done, and the holding of property theretofore acquired. Flint v. Stone Tracy Co., 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; McCoach v. Minehill & S. H. R. Co., 228 U. S. 295, 33 S. Ct. 419, 57 L. Ed. 842. Plaintiff is entitled to recover on its first cause of action. If the act is construed as imposing such a tax, it would imperil its constitutionality."

The error of the Court in this case consists in failing to recognize that the holding of the timber pending its enhancement in value is as much an indispensable and

necessary element of the business of speculating in timber lands as is the buying and selling of the lands. Viewed in its proper relation to the business as a whole such holding is not a mere incident of ownership, but is active and forms an inseparable part of an effort in the pursuit of profit and gain. There is no essential difference between the business of speculating in timber lands and dealing in the ordinary forms of commodities except that a much longer period as a rule is required in order to effect profitable sales of real estate. The fact that a person engaged, let us say, in the business of dealing in automobiles might not make a sale for a long period would certainly not mean that he was not engaged in business. Similarly, the fact that plaintiff, although endeavoring to make sales of its lands during the taxable periods, did not do so, does not mean that plaintiff was not carrying on a business.

Plaintiff's activities were not limited merely to the owning and holding of property under lease and the distribution of its avails, *(Von Baumbach case p. 516),* or to receiving the ordinary fruits that arise from the ownership of property. *(Minehill case p. 306).* "It was organized for profit and was doing what it principally was organized to do in order to realize profit." *(Chile Copper Company case, p. 455.)* It was engaged in "managing" its properties, *(Flint v. Stone Tracy Company case, p. 171)* and endeavoring to bring about a sale thereof for profit. Respondent, therefore, substantially exercised and enjoyed the privilege of doing business with the advantages arising from corporate organization, and hence was subject to the capital stock

tax. It is respectfully submitted, therefore, that the judgment of the District Court should be reversed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

LYNDON H. BAYLIES,
Attorney, Bureau of Internal Revenue.

APPENDIX

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF PENNSYLVANIA.

HARMAR COAL COMPANY, a Corporation of the State of Pennsylvania,

vs.

HEINER, Collector.

OPINION

(February, 1928).

SCHOONMAKER, Judge:

A jury trial was waived in this case. It is a suit to recover the amount of certain capital stock excise taxes alleged to have been erroneously collected from the plaintiff for the taxable period from July 1, 1921, to June 30, 1923. The taxes involved were levied under Section 1000 of the Revenue Act of 1918 (40 St. 1057-1126), and Section 1000 of the Revenue Act of 1921 (42 St. 227-294), respectively. This section of both acts is the same. Both statutes impose "a special excise tax with respect to carrying on or doing business." Both exempt "any corporation which was not engaged in business * * * during the preceding year ending June 30th."

The plaintiff claims exemption because it was not engaged in business during any of the taxable periods.

We make the following findings of fact in this case:

FINDINGS OF FACT

On the 19th of December, 1923, the plaintiff paid to the defendant, capital stock excise taxes for the year ending June 30, 1921, $2027.00; for the year ending June 30, 1922, $2025.00; for the year ending June 30, 1923, $2028.00; aggregating $6080.00. In due form, the plaintiff filed with the Commissioner of Internal Revenue, claims for refundment of each of said taxes respectively, which refundment was entirely rejected by said Commissioner. Thereafter, the plaintiff brought this suit for the recovery of these taxes.

The plaintiff is a Pennsylvania corporation, chartered in 1912 for the purpose of "mining, preparing for market and selling coal, manufacturing and selling coke and such other minerals as may be incidentally developed, and their products."

Another corporation by the name of the Bessemer Coal & Coke Company, also a Pennsylvania corporation, organized the plaintiff corporation, and has been its sole stockholder since organization. The plaintiff acquired certain coal properties in the years 1912 and 1913, but never operated any of them for the production of coal therefrom. In its capital stock tax returns, the plaintiff stated its business as that of "buying and selling coal lands." In a letter to the Deputy Commissioner of Internal Revenue, its attorneys stated the purpose of organizing the plaintiff corporation as follows:

> "Purchasing, leasing and acquiring coal lands of operating, controlling and managing properties for the mining of coal and the manufacture of coke in the State of Pennsylvania, and other states; of mining, preparing for market, selling and shipping coal and its products, and of purchasing, leasing, renting, and acquiring in the State of Pennsyl-

vania, and other states, land and other property necessary or convenient in mining, preparing for market and shipping coal and its products and doing the business of the company."

Prior to the taxable periods in question in this suit, the plaintiff had sold some of its coal lands, but, during the taxable years, held four hundred acres of undeveloped coal lands. These coal lands were subject to certain mortgages, either existing at the time of purchase, or given to secure balance of purchase money, on which the Bessemer Coal & Coke Company paid, during the taxable periods, the interest and certain installments of principal. This latter company likewise paid, during the same period, the taxes accruing against the plaintiff company, its legal expenses, and premiums on fire insurance on a building owned by the plaintiff. The several items of disbursement were charged by the Bessemer Coal & Coke Company to the plaintiff, and were credited to that company by the plaintiff upon its books.

During the taxable periods, the plaintiff also owned all of the capital stock of still another Pennsylvania corporation, i. e., Indianola Coal Company. This stock was purchased prior to the taxable periods involved here. The plaintiff paid part cash therefor and gave notes for the balance of the purchase money, some of which were liquidated as they fell due during the taxable year, by the Bessemer Coal & Coke Company; and they were credited to that company upon the books of the plaintiff.

In addition to that, during the taxable period, namely, on or about September 21, 1920, the plaintiff acquired title to a house and lot on Franklin Street, North Side, Pittsburgh, Pennsylvania, subject to a mortgage of $2500, the payment of which by the Bessemer Coal &

Coke Company for the account of the plaintiff constituted the entire consideration. The legal title to this piece of real estate had been in the name of an officer of the Bessemer Coal & Coke Company for about twenty years prior to this date, as a trustee for that company which furnished the money to buy it. This conveyance was made at the request of the Bessemer Coal & Coke Company. This real estate was rented at an annual rental of approximately $400.00.

During the taxable period, the plaintiff held directors' meetings, elected officers, and maintained its corporate existence.

CONCLUSIONS OF LAW

Under this state of facts, we concluded that the plaintiff is not entitled to recover, and that judgment should be entered for the defendant.

DISCUSSION

We arrive at this conclusion, because, in our opinion, the plaintiff corporation was carrying on, or doing business during the taxable periods.

In arriving at this conclusion, we have noted very carefully the various decisions of the Supreme Court bearing upon the question of corporate liability to this excise tax.

We note, first, that the tax is assessed upon "doing business," and business has been defined by the Supreme Court in the case of Flint v. Stone Tracy Co., 220 U. S. 107-171 as follows:

> " 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People v. Commissioner of Taxes, 83 N. Y. 242, 244. 'That which occupies the time, attention and labor of men

for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, Vol. I, page 273."

We note further that the decision in each case must depend upon the particular facts before the court, and that in Von Baumbach v. Sargent Land Co., 242 U. S. 503-516, the Supreme Court, Mr. Justice Day delivering the opinion, had this to say with reference to the test applicable to such facts:

> "The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

Then, again, the Supreme Court, further dealing with this subject in the case of Edwards v. Chile Copper Company, 270 U. S. 452, had this to say with reference to the application of this statute:

> "The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit."

In the instant case, we find that the plaintiff corporation was organized for profit, and was doing what it principally was organized to do, to realize profit. It, therefore, comes strictly within the interpretation of the Supreme Court in the case of Edwards v. Chile Copper Company, supra.

The Supreme Court again spoke on the same subject in a per curiam opinion handed down on the 2nd day

of May, 1927, in Phillips v. International Salt Company, reversing, on the authority of Chile Copper Co. v. Edwards, supra, the decision of the Circuit Court of Appeals, 3rd Circuit, reported in 9 Fed. (2nd) 389, which had held that the salt company having received and distributed dividends, endorsed notes of a company whose stock it held, and purchased bonds for the retirement or sinking fund purposes, was not doing business.

The Supreme Court has held in the cases of Zonne v. Minneapolis Syndicate, 220 U. S. 187; McCoach v. Minehill Railroad Company, 228 U. S. 295, that corporations which retained some active functions were not doing business, were companies which had ceased to do the business for which they were originally incorporated, and which had reduced their activities to the owning and holding of property and the distribution of the avails of that property, and which were doing only such acts as were necessary to continue that status.

We cannot find that the plaintiff falls within this class of cases. During the whole of the taxable period, it was continuing in the business for which it was incorporated, owned and held four hundred acres of coal lands, owned a house and lot and the stock of another coal company—all for the continued effort of profit and gain. The only case that we could find where a corporation which was carrying out the functions for which it was chartered, was held not to be doing business within the meaning of the statute, was the case of United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28, where the characteristic charter function was the bare receipt and distribution to the stockholders of rent from a specified parcel of land. It was held by the Supreme Court to be a mere intermediary for the distribution of rent, and therefore not doing business. In no sense can

the plaintiff's situation fall within the intermediary class.

We, therefore, must conclude that this tax was justly collected from the plaintiff, and that the plaintiff cannot recover in this case.

Let an order be submitted for the entry of judgment in favor of the defendant.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF PENNSYLVANIA.

INDIANOLA COAL COMPANY, a Corporation of the State of Pennsylvania,

vs.

HEINER, Collector.

OPINION
(February, 1928)

SCHOONMAKER, Judge:

This action, and that of Indianola Coal Company v. C. G. Lewellyn, formerly Collector, No. 3073, were tried together. A jury trial was waived in both cases, and the cases were heard before the Court without a jury.

Both actions seek to recover capital stock excise tax alleged to have been erroneously collected under the provisions of Section 1000 of the Revenue Acts of 1918 and 1921. The same essential facts prevail throughout the taxable periods covered by each case. We, therefore, shall make but one finding of facts, which will be applicable to both cases.

From the pleadings and the evidence in these cases, we find the following facts:

The plaintiff paid to D. B. Heiner, Collector of Internal Revenue, the sum of $3,512.00 capital stock taxes, under the provisions of the Revenue Act of 1918, for the taxable year ending June 30, 1921. Under the provisions of the Revenue Acts of 1918 and 1921, the plaintiff paid to C. G. Lewellyn, the former Collector, $6,838.00, as capital stock taxes, for the taxable year

ending June 30, 1922, and June 30, 1923. Due application was made to the Commissioner of Internal Revenue for refundment of these taxes, which refundment was refused.

The plaintiff corporation was incorporated in 1906 under the laws of the State of Pennsylvania, with power to engage in "mining and producing coal and other minerals, the transportation to market and sale thereof in crude or manufactured form." Shortly after incorporation the plaintiff acquired a large acreage of undeveloped coal lands. A part of these lands was sold in the year 1917; and the remainder, approximately 5,000 acres, has since been held for sale or development. The plaintiff has never engaged in mining operation. In its 1921 capital stock tax return, the company stated that it was engaged "in mining coal and dealing in coal properties." In its 1922 and 1923 capital stock tax returns, its business is described as "buying and selling coal lands." Its entire capital stock is held by the Harmar Coal Company, a Pennsylvania corporation, whose capital stock is, in turn, held by the Bessemer Coal & Coke Company, also a Pennsylvania corporation. The business activities of the plaintiff, from July 1, 1919, to June 30, 1923, can be generally classified as follows:

(1) Maintained corporate existence, holding corporate elections, etc.

(2) Held for sale or development approximately five thousand acres of coal lands.

(3) Loaned money and received interest on loans made, borrowed money, and paid interest thereon.

(4) Paid taxes and legal expenses.

(5) Sold securities and bonds held by it.

(6) Bought in 1919, coal lands, one parcel for $10,321.20, and another for $128.70.

(7) In 1920, bought a parcel of land for $530.00.

CONCLUSIONS OF LAW

Under this state of facts, we conclude that the plaintiff was engaged in business within the meaning of the taxing statutes during the whole period covered by these two actions, and may not recover back these taxes paid by it. We make this finding for the reasons stated in an opinion this day filed in the case of Harmar Coal Company v. D. B. Heiner, at No. 3071 Law.

An order may be submitted for the entry of judgment in these two cases in favor of the defendant.